

UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

MARINE EXCHANGE OF LOS ANGELES -
LONG BEACH HARBOR, INC.

Employer

and

Case No. 31-RC-7851

INTERNATIONAL LONGSHORE & WAREHOUSE
UNION, LOCAL 63, MARINE CLERKS ASSOCIATION,
OFFICE CLERICAL UNIT

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.^{1/}

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of the Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:^{2/}

INCLUDED: Full-time and regular part-time employees employed by the Employer at its facility in San Pedro, California, including VTS watch supervisors, VTS vessel traffic specialists, report supervisors, data base supervisors and archives supervisors.

EXCLUDED: Active Duty U.S. Coast Guard personnel, answering service operators, communications supervisors, administrative assistants, confidential employees, managerial employees, professional employees, all other employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION^{3/}

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to issue subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.

Those eligible shall vote whether they desire to be represented for collective bargaining purposes by INTERNATIONAL LONGSHORE & WAREHOUSE UNION, LOCAL 63, MARINE CLERKS ASSOCIATION, OFFICE CLERICAL UNIT.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); North Macon Health Care Facility, 315 NLRB 359 (1994). Accordingly, it is hereby directed that an election eligibility list, containing the **FULL** names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director for Region 31 within 7 days of the date of the Decision and Direction of Election. The list must be of sufficiently large type to be clearly legible. This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election, only after I shall have determined that an adequate showing of interest among the employees in the unit found appropriate has been established.

In order to be timely filed, such list must be received in the Regional Office, 11150 West Olympic Blvd., Suite 700, Los Angeles, California 90064-1824, on or before **May 1, 2000**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of 2 copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed the preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.).

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by ***May 8, 2000***.

DATED at Los Angeles, California this 24th day of April, 2000.

/s/ James J. McDermott
James McDermott, Regional Director
National Labor Relations Board
Region 31

FOOTNOTES

- 1/ The Employer, which contends that it does not meet the definition of “employer” under Section 2(2) of the Act, and thus should not be subject to the Board’s statutory jurisdiction, has stipulated that it meets the Board’s discretionary monetary jurisdictional standards. Thus, Marine Exchange of Los Angeles - Long Beach Harbor, Inc., hereafter Marine Exchange or the Employer, is a California non-profit, mutual benefit corporation, with an office and place of business located in San Pedro, California, where it is engaged in the business of providing maritime, vessel, and vessel traffic information. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$500,000, and provides services valued in excess of \$50,000 to entities which in turn meet the Board’s direct inflow or outflow jurisdictional standards. Thus, the Employer satisfies the Board’s discretionary standard for asserting jurisdiction over non-retail enterprises. *Siemons Mailing Service*, 122 NLRB 81 (1959).

I. STATUTORY JURISDICTION ISSUE

A. PARTIES GENERAL CONTENTIONS

As noted, the Employer disputes that it is an “employer” as defined in Section 2(2) of the Act. The Employer asserts that jurisdiction should not be asserted over Marine Exchange because, among other things, it is a “unique entity.” According to the Employer, Marine Exchange provides its vessel traffic services on behalf of the State of California, the Ports of Los Angeles and Long Beach, and the United States Coast Guard pursuant to a “unique partnership” and that everywhere else in the United States where vessel traffic service is provided, it is provided by Federal employees. The Employer contends that Marine Exchange acts as an “agent” on behalf of the State of California and the Ports of Los Angeles and Long Beach to collect tariffs and that Marine Exchange’s services are an essential government function intimately connected to maintaining the safety of the harbor.

The Employer further contends that Marine Exchange is a “political subdivision” of the State of California and the Ports of Los Angeles and Long Beach as that term has been described in NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 91 S. Ct. 1746 (1971), and that it is thus not subject to the Board’s statutory jurisdiction.

The Employer asserts that by virtue of their fundamental involvement in the re-invention of Marine Exchange through the introduction of the Vessel Traffic Information Service, hereafter VTIS, the State of California and the Ports of Los Angeles and Long Beach essentially created Marine Exchange as it exists today. Additionally, the Employer contends that Marine Exchange should be considered a political subdivision because its Board of Directors includes three individuals employed by entities that are directly responsible to the public. According to the Employer, the three individuals have the power to vote, and hold key positions of authority with respect to the Board of Directors and Marine Exchange, including Chairman of the Marine Exchange Board of Directors and the head of its Personnel Committee.

Furthermore, the Employer asserts that strong doctrinal and policy considerations demand reconsideration of the rule announced by the Board in Management Training Corp., 317 NLRB 1355 (1995), that “jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employees’ terms and conditions of employment.”

According to the Employer, Marine Exchange’s ties with the Coast Guard, the State of California and the Ports of Los Angeles and Long Beach preclude it from bargaining over essential economic and non-economic terms and conditions of employment. Accordingly, the Employer argues that asserting jurisdiction over the Employer

in this case will not best effectuate the policies of the Act.

Additionally, the Employer argues that it is a joint employer with the United States Coast Guard over the VTIS employees and as a result is not subject to the statutory jurisdiction of the Board.

According to the Petitioner, the Employer is not “a political subdivision” as that term is defined in *Hawkins*, supra, as it is not a wholly owned Government corporation nor was it “created directly by the state, so as to constitute a department or administrative arm of the government” nor is it “administered by individuals who are responsible to public officials or to the general electorate.” The Petitioner asserts that the Employer’s alleged joint employer contentions are irrelevant under existing case law. Thus, the Petitioner contends jurisdiction should be asserted over the Employer.

B. BACKGROUND FACTS

The history of Marine Exchange dates back to the early 1920’s. Back then, ship owners and their agents would send “runners” out to points along the coast to watch for their ships to come in. Upon spotting their vessels, the runners would report back to their offices and make arrangements to handle the ship when it docked by alerting, among others, pilots, tug boat operators, customs agents and port authorities.

By around 1920 (when the Port of Los Angeles and Long Beach were established) it was realized that the services provided by the runners could be offered by a staff of full-time professional “lookouts” capable of identifying and communicating with arriving ships, and then “passing the word” along to the proper persons, agencies or authorities in connection with the vessels.

In July 1920 a local steamship agent/customhouse broker formed “The Maritime Exchange and Shipping Club of the Port of Los Angeles.” He hired professional lookouts (many of them retired Quartermasters and Signalmen from the United States Navy and United States Coast Guard) and offered the new lookout and reporting service to the maritime industry and waterfront community for a fee.

The service was popular but not profitable. By 1923 The Maritime Exchange and Shipping Club of the Port of Los Angeles was declared insolvent. As a result, the Los Angeles Area Chamber of Commerce, hereafter the LAACC, took over the lookout operation and adopted the name Marine Exchange of Los Angeles. The

LAACC is a private, nonprofit organization composed of business leaders from the Los Angeles area. Marine Exchange's relationship with the LAACC, as a non-profit affiliate, lasted for over 72 years.

C. CORPORATE STRUCTURE OF MARINE EXCHANGE

In 1946, Marine Exchange was formally incorporated as a non-profit trade organization with the State of California, and the name Marine Exchange of Los Angeles - Long Beach Harbor, Inc. was adopted. Its stated purpose, among other things, was to maintain lookout stations for Los Angeles and Long Beach harbors, gather information pertinent to ship arrivals and departures, weather, and other marine intelligence, and disseminate that information for a fee to government and private subscribers. Pursuant to Marine Exchange's original Articles of Incorporation, upon dissolution, Marine Exchange's assets were to be distributed to the LAACC.

In the summer of 1995, the Board of Directors declared Marine Exchange to be an independent, self-supporting, non-profit organization, and asked to be released from its affiliate status with the LAACC. The LAACC complied, and complete separation of the two organizations was accomplished in early 1996.

In 1996, amended Articles of Incorporation were recorded and filed with the State of California. The amended Articles provide that Marine Exchange's authorized purposes are:

- (Two) a. To maintain an official Lookout Station, or Stations, for the Harbors of Los Angeles and of Long Beach, or either of them; to obtain and issue information, upon a fee basis or otherwise, for, and to, government and private subscribers pertinent to ship arrivals and departures, and other marine movements, weather conditions, casualties, and other marine intelligence; to compile and disseminate statistical data, upon a fee basis or otherwise, with respect to foreign commerce passing through Los Angeles Harbor and Long Beach Harbor, or either of them, with respect to the foregoing and domestic movement of specific commercial commodities;

- b. To provide reports and services regarding ship movements and activities for the Ports of San Diego and Hueneme, upon a fee basis or otherwise, to government and private subscribers, in the same manner and scope as outlined in Article Two(a);
- c. To provide 24-hour Vessel Traffic Information Service (VTIS) in accordance with State and Federal laws, and in partnership with the United States Coast Guard (USCG), the California Office Oil Spill Prevention and Response (OSPR), the Ports of Los Angeles and Long Beach, and other entities, upon a fee basis, to all arriving 'Covered Vessels';
- d. To purchase, lease and/or otherwise acquire; to hold, own, and/or enjoy; and to sell, lease, mortgage and/or otherwise encumber and dispose of, any and all kinds of real personal property, to carry on any and all operations necessary or convenient in connection with the activities of this corporation;
- e. To borrow money, either with or without security, and to give such promissory notes, mortgages, and/or other instruments of hypothecation as may be deemed necessary or advisable by the Board of Directors;
- f. To carry into effect any one or more of the objectives and purposes hereinabove set forth; and, to that end, to do any one of more of the acts and things aforesaid; and likewise any and all acts or things necessary to incidental thereto; and, in conducting or carrying on its activities (and for the purpose of promoting or furthering anyone or more of its said objectives or purposes) to exercise any or all of the powers herein set forth in this and any other article, or additional power now or hereafter authorized by law, either alone or in conjunction with others, as Principal, Agent, or otherwise.

The restated Articles of Incorporation also provide that upon dissolution, the assets of Marine Exchange are to be distributed to the Ports of Los Angeles and Long Beach.

In 1997, Marine Exchange's bylaws were also revised. The Board of Directors is the governing body of Marine Exchange. The Board of Directors is to consist of 15 regular voting directors from the following suggested categories of the maritime industry: admiralty law, agents (ship/cargo), break/bulk operators, container operators, international finance, Long Beach pilots, Los Angeles pilots, marine insurance, The Port of Long Beach, The Port of Los Angeles, reefer

operators, Steamship Association of Southern California, tanker operators, terminal operators, tug/barge operators, and "at large." The Executive Director of Marine Exchange is a non-voting ex-officio director. There are also four non-voting advisors and liaisons.

The Board of Directors appoints a committee to select qualified candidates for election to the Board at least 60 days before the date of any election of directors. The nominating committee includes the current chairman and four regular directors. Regular directors are elected from nominees at the annual Board of Directors meeting. The regular directors serve a 3-year term. Vacancies on the Board of Directors are filled by the vote of a majority of the Board of Directors.

Officers of the Corporation, which include the Chairman, President, Vice President, Secretary and Treasurer, are chosen by the Board of Directors and serve at the pleasure of the Board of Directors and can be removed with or without cause.

The Executive Director of Marine Exchange reports directly to the President regarding Marine Exchange's day-to-day operations, activities and decisions.

As per the bylaws, there are representatives of the Port of Los Angeles and Long Beach on the present Board of Directors. There are presently two representatives from the Port of Los Angeles and one from the Port of Long Beach. Representing the Port of Los Angeles are the Pilot Services Manager for the Port of Los Angeles (a civil service position) and the Director of Administration for the Port of Los Angeles. The current Chairman of the Board is a representative of the Port of Long Beach. These three, plus the Captain of the Port, who is also the Coast Guard Commanding Officer (a non-voting member of the Board), constitute the public officials on Marine Exchange's Board of Directors. Testimony from Marine Exchange's Deputy Executive Director indicates that in the seven or so years he has been with Marine Exchange, there has never been a time when representatives of the Port of Los Angeles or Long Beach, or any other government entity, have ever constituted a majority of the Board of Directors. Rather, industry

representatives from the various suggested categories in the bylaws have always composed a majority of the Board.

D. MARINE EXCHANGE OPERATIONS

According to its Deputy Executive Director, Marine Exchange was established in 1923 to “facilitate commerce and the betterment of commerce, in the ports of Los Angeles and Long Beach harbors.” Throughout the period of its existence, Marine Exchange has been engaged in the business of collecting information related to ship arrivals and departures and then “disseminat[ing] that information for the benefit of the merchants of the ports.”

Since its inception, Marine Exchange has been in the business of publishing and selling various shipping reports and surveys, and providing maritime industry research and various other information related services, to customers (also referred to as “subscribers”) in the Ports of Los Angeles and Long Beach. These customers include shipping agents, harbor pilots, tugboat operators, terminal operators, various kinds of shipping companies, newspapers, lawyers and the ports themselves.

As it has also done since its inception, Marine Exchange continues to operate as a maritime information service. It collects information on when ships arrive, depart, how long they will be staying, where they are berthed at, etc. To gather its information, Marine Exchange employees call the various vessel agents. The agents provide schedules on a daily basis. There is a constant updating of schedules. Marine Exchange solicits the information from the agents, collates it, puts it into various reports, subscribers then subscribe to Marine Exchange’s reporting services, and pay for the reports.

Marine Exchange also gathers information on 24 advance notification of foreign ships for the benefit of the Coast Guard, which information goes into Marine Exchange’s regular reports, and satisfies Coast Guard requirements.

Marine Exchange has 250 or so subscribers to its services. Marine Exchange sells its reports to private subscribers and government entities such as the Navy, Customs, and the Department of Agriculture. In addition, various state agencies also buy Marine Exchange's information.

Marine Exchange also provides a telephone answering service to about 36 different customers. In addition, Marine Exchange acts as dispatcher for 8 terminals, for security guards for ILWU Local 26. Marine Exchange connects the Union with the various facilities that need personnel. Marine Exchange also rents cell phones for arriving ships, provides local messenger delivery services, and provides billing services to the Steamship Association of Southern California, a private business organization.

Marine Exchange has also contracted with the State of California to provide its Executive Director as recording secretary for the Harbor Safety Committee. The Harbor Safety Committee is a formalized committee established by the Keene-Lempert-Seastrand Act of 1990. Keene-Lempert-Seastrand mandated that all ports in California must have a Harbor Safety Committee. This requirement came about as a result of the Exxon-Valdez incident, after which the State decided to take a stronger stance about environmental protection and Keene-Lempert-Seastrand Act grew out of that concern. Keene-Lempert-Seastrand also required that there be a vessel traffic service in each port.

E. VESSEL TRAFFIC INFORMATION SERVICE (VTIS)

The VTIS is another component of Marine Exchange's business. Marine Exchange's Deputy Executive Director testified that:

The vessel traffic service, in essence, assimilates ships into the system as they approach... the ports of Los Angeles and Long Beach. The VTIS takes ships in an orderly fashion... identifies who... the ships are, and what their destinations are. We notify the appropriate entities in the port. We apprise the incoming ships of any unique characteristics that may be going on in the port, such as fog that they may encounter along the way, or dredging that they can anticipate. We apprise them of rules that are in effect... We in general, make sure that the ship is

properly informed, and that people who are expecting him, are equally properly informed as to his status and where he is going.

Marine Exchange operates VTIS in conjunction with the U.S. Coast Guard, the State of California Office of Oil Spill Prevention and Response, hereafter OSPR, and the Ports of Los Angeles and Long Beach. VTIS monitors, and in some cases regulates, ship traffic in the Los Angeles-Long Beach harbor area and adjacent waters within a 25-mile radius. VTIS commenced operations on or about March 1, 1994.

Prior to 1994, going back to approximately 1981, Marine Exchange had established a vessel traffic advisory service, hereafter VTAS. This was a limited operation conducted with the "blessing" of the Coast Guard through the use of radar equipment and radio broadcasts detailing ship movements in the harbor area. As a provider of VTAS information, Marine Exchange had no regulatory authority, was not integrated into the Coast Guard information technology network, and had much less technological sophistication.

As noted, in response to the Exxon-Valdez oil spill in Alaska, the State of California took a stronger stance with respect to environmental protection. One of the outgrowths of this concern with environmental issues was the passage of the Keene-Lempert- Seastrand Act. Keene-Lempert-Seastrand mandated that OSPR, work in conjunction with the Coast Guard to establish VTIS operations in the State's ports.

At the time, the Coast Guard did not have the requisite manpower or funds to unilaterally establish a VTIS in the Ports of Los Angeles and Long Beach. Instead, Marine Exchange and the Coast Guard formed a partnership to jointly provide VTIS for the Ports of Los Angeles and Long Beach.

Marine Exchange participates in the VTIS operation pursuant to statutory authority granted by California Government Code, Section 8670.21(f) and the California Harbors and Navigation Code, Sections 445, et seq.

Marine Exchange received various grants and loans, from the State of California and the Ports of Los Angeles and Long Beach, to help establish VTIS. In order to help establish VTIS, OSPR extended a million dollar line of credit to Marine Exchange through the Beverly Bill, Senate Bill No. 171, chaptered October 11, 1993.

The California Legislature provided the statutory authority for the line of credit from the OSPR. These efforts resulted in the amendment of the Harbors and Navigation Code to include Article IV pertaining to the VTIS. (Elder Assembly Bill No. 134, filed October 14, 1991.) Among the provisions of this article was language establishing the Marine Exchange VTIS, which states:

§445. Operation by Marine Exchange of Los Angeles-Long Beach Harbor, Inc. in VTS area.

(a) The Marine Exchange of Los Angeles-Long Beach Harbor, Inc., ... may operate a vessel traffic service, in cooperation with, and subject to the supervision of, the United States Coast Guard, for the waters of San Pedro Bay, San Pedro Channel, and Santa Monica Bay with a radius of 25 nautical miles of the Point Fermin Light.

The California Legislature also extended limited governmental immunity to Marine Exchange in its functions as a VTIS provider. (Marks Senate Bill No. 200 - Assembly Bill 748, filed October 14, 1991.) This immunity was formalized in the California Government Code §8670.21, which was amended to read:

(3) No vessel that is required to comply with Article 4 (commencing with Section 445) of Chapter 1 of Division 3 of the Harbors and Navigation Code shall assert any claim against the Marine Exchange or any officer, director, employee, or representative of the Marine Exchange for any damage, loss, or expense, including any rights of indemnity or other rights of any kind, sustained by that vessel or its owners, agents, charterers, operators, crew, or third parties arising out of, or connected with, directly or indirectly, the Marine Exchange's operation of the vessel traffic service, even though resulting in whole or in part from the negligent acts or omissions of the Marine Exchange or of an officer, director, employee, or representative of the Marine Exchange.

(4) Each vessel that is required to comply with Article 4 (commencing with Section 445) of Chapter 1 of Division 3 of the Harbors and Navigation Code shall defend, indemnify, and hold harmless the

Marine Exchange and its officers, directors, employees, and representatives from any and all claims, suits, or actions of any nature by whomsoever asserted, even though resulting or alleged to have resulted from negligent acts or omissions of the Marine Exchange or of an officer, director employee, or representative of the Marine Exchange.

(5) Nothing in this subdivision affects any liability or rights that may arise by reason of the gross negligence or intentional or willful misconduct of the Marine Exchange or of an officer, director, employee, or representative of the Marine Exchange in the operation of the VTS system, including any liability pursuant to subdivision (c) of Section 449.5 of the Harbors and Navigation Code.

Marine Exchange has received the use of its current facility from the U.S. Coast Guard rent [free](#). The Coast Guard owns the building that houses Marine Exchange. Marine Exchange uses it pursuant to a revocable license. The Ports of Los Angeles and Long Beach helped facilitate Marine Exchange's initial move to its current facility by extending a line of credit for costs involved in the relocation.

The Ports also each granted \$250,000 to Marine Exchange for infrastructure costs and forgave the remainder of a \$125,000 loan they had each extended to Marine Exchange to cover the costs of moving into their current facility.

The VTIS operation is funded by vessel user fees, ranging from \$200.00 to \$400.00 per vessel, which are included in the tariffs imposed by the Ports of Los Angeles and Long Beach. VTIS fees can only be set or adjusted by the governing boards of the two Ports. Marine Exchange bills the operators of arriving vessels for fees on a monthly or per-ship basis, and the fees are paid directly by the operators to Marine Exchange. These fees account for approximately 75% of the Employer's total revenues. The balance is provided by fees charged to customers for Marine Exchange's maritime information services and reports.

When it has been determined that revenues from VTIS user fees have exceeded total annual expenses for operating the VTIS system, Marine Exchange has authorized refunds of some portion of the fees to the vessel operators. The decision to refund the fees, and the determination of the amount to be refunded,

has been made by the Marine Exchange Board of Directors. The Ports of Los Angeles and Long Beach are not involved in the refund process.

The Los Angeles-Long Beach VTIS operation is composed of four regular watch sections, which are usually referred to as watch "teams." Each team has 3 members. Each 3-person watch team includes one VTS watch supervisor and two VTS vessel traffic specialists, also referred to as "watchstanders". The teams work 12-hour day and night shifts, on a rotating 3-days on/3-days off basis.

There is a high level of cooperation between Marine Exchange and the Coast Guard in operating VTIS. The Coast Guard has set up VTIS operations in a number of ports such as Houston, San Francisco, New York, Saulte St. Marie and Valdez, Alaska. Each of these stations other than Los Angeles/Long Beach are operated and manned exclusively with Coast Guard personnel.

The Coast Guard has substantial involvement in the formulation of the policies that govern the operation of the VTIS. The original written policies that governed the operation of the VTIS were set forth in the VTIS Operations Manual. This document was originally written by Marine Exchange's present Operations and Training Manager when he worked as a Coast Guard Chief stationed at Marine Exchange. It was then circulated among a number of organizations including the Harbor Safety Committee, the Coast Guard Marine Safety Office and Marine Exchange, who were all given the opportunity to offer their input. In subsequent years, the Operations Manual has undergone alterations. In each of these situations, the revised document was not final until it was jointly approved by Marine Exchange and the Coast Guard.

The Coast Guard was also involved in the decision to expand the composition of the VTIS watch from two to three employees. The Coast Guard was involved in interviewing candidates for the watch supervisor positions.

Marine Exchange and the VTIS assist the Coast Guard in preserving the safety of the ports by monitoring the movements of ships for violations of the local

rules such as exceeding the speed limit or taking a buoy “on the wrong side.” When the VTIS encounters a violation, the Coast Guard has established a reporting mechanism whereby the VTIS watch supervisor files an incident report with the Coast Guard. After the incident report is filed, Marine Exchange has the discretion to call in the ship captain or the shipping agent for counseling and/or to recommend to the Coast Guard that it take further action.

In more extreme and rare situations, Marine Exchange can recommend that the Coast Guard board a ship. When the circumstances dictate, the VTIS can identify ships that should be boarded. Marine Exchange personnel never board a vessel.

The Coast Guard has delegated to the VTIS the ability to convey orders to vessels under the exercise of “Captain of the Port” authority. Ordinarily, VTIS operations do not have the ability to issue binding orders with respect to certain areas like speed of a vessel. The Coast Guard Captain of the Port has plenary power over the movement of vessels in United States ports and waterways. In emergency situations, the Captain of the Port’s authority can be invoked to command a ship’s actions. The Marine Exchange, through the VTIS watch supervisor and the Coast Guard watchstander on duty, has the ability to exercise the Captain of the Port’s authority in limited circumstances.

Marine Exchange has limited authority to grant “deviations” from the Federal rules governing vessel movement in the harbor. The Federal government promulgates these rules through the Code of Federal Regulations. The VTIS has the authority to independently assess emergency situations and grant deviations when the situation demands. These deviations are generally spelled out in great detail in various operating manuals as to how they are to be handled.

Each VTIS watch team must include at least one active duty U.S. Coast Guard member. This is a legal requirement which must be satisfied in order for VTIS to exercise delegated Coast Guard “Captain of the Port” authority in situations where it is appropriate to do so.

In the absence of a Coast Guard watchstander, VTIS has no authority to order a vessel that it is monitoring to reduce its speed, turn right in order to avoid a collision with another vessel, leave a designated navigation area, or take some other appropriate action. The applicable Coast Guard rules and directives state that VTIS-delegated authority to control vessel movements "may only be exercised in those instances where, in the opinion of the Coast Guard watchstander, the normal procedure of alerting the Captain of the Port of the situation and requesting such an order from the Captain of the Port would cause such a delay in issuing a Captain of the Port directive as to result in substantial aggravation of the danger involved."

Two of the four VTIS watch teams have regular watch supervisors who are active duty Coast Guard personnel. The other two watch teams have watch supervisors who are Marine Exchange civilian employees. One works day shift and one works nightshift.

During the course of a 12-hour shift, the three members of the team rotate the duties of the watch every two hours. The rotation is among the radar, information, and "off" positions. One team member starts the shift on the radar watch, and is responsible for tracking incoming and outgoing vessels on the radar, establishing and maintaining radio contact with the vessels, and obtaining necessary information from the vessels such as their estimated time of arrival and any equipment or other problems they might be experiencing. Another team member starts at the marine information desk position, and is responsible for inputting vessel information in the VTIS computer system, making entries in the written "rough log" of the watch, handling incoming telephone calls from shipping agents or other Marine Exchange customers, and making any necessary outgoing calls to notify pilots, tugboat companies or other Marine Exchange subscribers regarding ship arrivals or departures, etc. The third team member, who starts the shift in the "off" position, is essentially on a work break and is free to leave the watch center but not the building. After two hours, the team members rotate the above-described positions among themselves.

In addition to Marine Exchange employees and Coast Guard members assigned to the regular watch teams, there are two “floaters” who are available to fill in for team members who are on vacation, sick, or for some other reason unable to work. Both of the floaters are qualified to work as VTS vessel traffic specialists, and one of them is also qualified to work as a alternate VTS watch supervisor. One or both of the floaters is usually present at the facility during the day shift.

F. ANALYSIS AND CONCLUSION

In Management Training Corp., 317 NLRB 1355 (1995), the Board overruled Res Care, Inc., 280 NLRB 670 (1986) and its progeny, and determined that jurisdiction would no longer be determined on the basis of whether the employer or the Government controlled most of the employee’s terms and conditions of employment. The Board further decided that it should not be deciding as a jurisdictional question which terms and conditions of employment are or are not essential to the bargaining process.

As a result, the Board in Management Training concluded that in determining whether it should assert jurisdiction over entities such as Marine Exchange, it will only consider whether the employer meets the definition of “employer” under Section 2(2) of the Act, and whether such employer meets the applicable monetary jurisdictional standards.

As noted, Marine Exchange has admitted that it meets the Board’s applicable monetary jurisdictional standards. Thus it must be determined under Management Training and NLRB v. Natural Gas Utility District of Hawkins County, Tennessee, 402 U.S. 600, 91 S. Ct. 1746 (1971), whether Marine Exchange meets the definition of “employer” under Section 2(2) of the National Labor Relations Act.

Section 2(2) of the Act defines as “employer as:

“any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”

In *Hawkins*, the Supreme Court noted that the term “political subdivision” is not defined in the Act and the Act’s legislative history does not disclose that Congress explicitly considered its meaning. The legislative history does reveal, however, that Congress enacted the Section 2(2) exemption to except from Board cognizance the labor relations of federal, state, and municipal governments, since governmental employees do not usually enjoy the right to strike. In the light of that purpose, the Board has limited the exemption for political subdivisions to entities that are either: (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.

Thus it must further be determined whether Marine Exchange is a “political subdivision” under a *Hawkins*-type analysis.

I conclude that the evidence, testimony and record as a whole do not support a finding that Marine Exchange is a “political subdivision.” It is clearly not a wholly owned Government corporation. Nor does the evidence convince me that it was “created directly by the state so as to constitute a department or administrative arm of the government” or that it de facto has “morphed” into a department or administrative arm of the government.

The Employer contends that Marine Exchange has undergone a “sea change” which is tantamount to a “re-creation of the entire corporation.” As a result, the Employer contends that Marine Exchange should now be considered to have been created by the State of California and the Ports of Los Angeles and Long Beach as a quasi-governmental entity providing an essential governmental function - VTIS - to the harbor. The Employer relies on *City Public Service Board of*

San Antonio, 197 NLRB 312 (1972) to support its contention. The Employer's reliance on that case is misplaced. In finding the Employer in City Public Service to be a political subdivision, exempt from the Act's coverage, the Board found, significantly, that the employer had the power, among other things, of eminent domain and could bring condemnation suits in the name of the city. Such significant power, one of the elements specifically noted in Hawkins regarding a political subdivision finding, is absent in the present case.

The record reveals that Marine Exchange was established in 1923 by the Los Angeles Area Chamber of Commerce as a private trade organization dedicated to promoting commerce in the Los Angeles-Long Beach Harbors and the interests of the local maritime industry. Neither its original, nor subsequently amended, Articles of Incorporation, nor its bylaws, indicate that it was created by the State of California, or was ever intended by its incorporators, to serve as a "department or administrative arm of the government," or was intended to be some quasi-governmental arm of the government.

I further do not find that the legislative underpinnings of the Vessel Traffic Information Service somehow converts Marine Exchange into a department or administrative arm of the government. Marine Exchange remains a nonprofit, mutual benefit corporation which has entered into an agreement, a "unique partnership" with the State, the Coast Guard and the Ports to help provide a service to the maritime industry. Marine Exchange continues to operate as a clearing-house for maritime information and services in addition to the VTIS operation.

Marine Exchange's Articles of Incorporation and Bylaws were amended in 1996 and 1997, after much of the relevant legislation in this case was filed. The Elder Bill was filed in 1991. The Beverly Bill was chaptered in October 1993. The Marks and Kuykendall bills were filed and chaptered in August 1996. As noted, the amended Articles of Incorporation and Bylaws do not state that Marine Exchange is operating as an arm or department of the State, nor does the legislation enacted for its benefit.

I further conclude that the record also does not support a finding that Marine Exchange is controlled by “individuals who are responsible to public officials or to the general electorate.” Marine Exchange is governed by a Board of Directors with 15 voting members. Only three of those voting members are public officials. The other twelve are representatives of private firms in various sectors of the local maritime industry. Public officials have never constituted a majority of the Marine Exchange voting directors. Indeed, by virtue of the categories of representation required, Marine Exchange’s own bylaws virtually require that its Board of Directors be dominated by private maritime industry interests. See Spectrum Healthcare Services, 325 NLRB 1061 (1998); Kentucky River Community Care, 193 F.3d 444 (6th Cir. 1999).

In addition, the Board, in applying the Hawkins test, has consistently held that in order for a corporation governed by a Board of Directors to be found to be “administered by individuals responsible to public officials or to the general electorate,” those individuals must constitute a majority of the board. Enrichment Services Program, Inc., 325 NLRB 818, 819 (1998). As noted, only three of the 15 members of Marine Exchange’s Board of Directors are public officials, clearly fewer than a majority.

The Employer’s Capitol / EMI, 311 NLRB 997 (1993) joint employer argument regarding Marine Exchange, the State of California, the U.S. Coast Guard and the Ports of Los Angeles and Long Beach is legally irrelevant under current law. Board of Education of Calvert County, 322 NLRB 860 (1997); Central Security Services, Inc., 315 NLRB 239 (1994); Management Training, supra. Thus the fact that the Coast Guard exercises joint control over the qualification standards for the civilian VTS specialists and watch supervisors employed by Marine Exchange and the work schedules and job duties of those employees is irrelevant to the political subdivision argument. Enrichment Services, supra.

I also conclude that the Employer’s Rural Fire Protection, 216 NLRB 584 (1975) “intimate connection” argument and National Transportation Services, 240 NLRB

565 (1979) "subjects of bargaining" argument are also legally irrelevant under current law. *Management Training*, supra.

As a result, based on the record, exhibits and current law, it cannot be concluded that Marine Exchange is exempt from the Board's statutory jurisdiction as a "political subdivision."

Thus, Marine Exchange is an "employer" under Section 2(2) of the Act and subject to the Board's statutory, as well as discretionary, jurisdiction.

- 2/ The parties stipulated that the appropriate unit in this matter should include full-time and part-time employees employed at the Employer's San Pedro facility including VTS vessel traffic specialists, report supervisors, data base supervisors and archives supervisors and should exclude answering service operators, communication supervisors, administrative assistants, confidential employees, managerial employees, professional employees, all other employees, guards and supervisors as defined in the Act. The parties could not agree on the unit placement of VTS watch supervisors although they did agree that the two "floater" watch specialists/ watch supervisors should be included in the unit. No party is seeking to include the active duty Coast Guard personnel in the unit.

The Petitioner contends that VTS watch supervisors should be included in the unit and the Employer contends they should be excluded as supervisors and/or managers.

II. SUPERVISORY ISSUE

A. PARTIES GENERAL CONTENTIONS

The Employer submits that the VTS watch supervisors should not be included in the bargaining unit by virtue of their supervisory and/or managerial authority.

The Employer contends that the watch supervisors are supervisors within the meaning of Section 2(11) by virtue of their authority and independent judgment and discretion to: discipline employees, adjust employee grievances, assign work,

grant permission to leave work early and to secure replacements in such a situation, and evaluate trainee performance in such a way that it directly impacts the employee's continued employment. The Employer further contends that the watch supervisors are the individuals vested with final authority on their watch to determine policy vis-à-vis the management of employees and the operation of the VTIS in general and should be considered managerial employees.

The Petitioner contends the watch supervisors are not supervisory or managerial, they are more akin to leadmen with greater expertise and technical skill, and should be included in the bargaining unit.

B. BACKGROUND FACTS

When the VTIS commenced operations in March 1994, it utilized two-person watch teams. Neither of the team members was designated as a "supervisor". With only two on a team, there were fatigue problems. This "fatigue factor" was a primary factor in the Employer's subsequent decision to expand the watch teams to include three members. As stated in the testimony, fatigue was basically "the factor" in the decision to expand to a three-person team.

Marine Exchange management decided to designate the third member of the expanded team as a "watch supervisor" who would be "in overall charge" of the watch. Marine Exchange's Operations and Training Manager stated that it was intended by Marine Exchange management that the watch supervisor function as a third member of the team with "more experience and technical expertise" than the other two. The watch supervisors are to "ensure that the primary mission is never compromised." Watch supervisors "are responsible for the conduct of their personnel while on watch and could be held accountable should" a mishap occur.

The Operations Manager testified that the watch supervisors are the "ultimate authority" on the watch. The training study guide used by Marine Exchange in training both civilian and military candidates for the new supervisor position states that the:

...Watch Supervisor has been added to the watch to increase overall watch experience, expertise and proficiency. The supervisor will ensure the watch is proactive and professional in its performance, maintains good situational awareness, is cognizant of the ever-changing 'big picture' and facilitates informed decision-making by those involved with vessel movements.

The training guide also lists a number of operational responsibilities to be assumed by the watch supervisor, for example, ensuring continual assessment of ship movements, understanding differences in vessel capabilities/limitations, proper bridge management and the role of pilots and tugs, pertinent rules and law, weather, and other factors affecting vessel movement decisions. It further states that the watch supervisors are responsible to "motivate and lead all members of their watch to work as a team, confirming the radars are monitored, all vessels tracked, radio broadcasts made and information/advice is provided to vessels operating with the VTIS Area of Responsibility". It also states that the watch supervisor is to be responsible for the "routine of the watch".

As testified to by one of the two Marine Exchange civilian watch supervisors, he was told in his interview with Marine Exchange management that the reason for creating the position was "basically, to provide someone with a little more expertise. Someone who had worked at Marine Exchange a little bit longer, had a little bit more cohesiveness of what the responsibilities were of the watch".

The watch supervisor position is considered a promotion from the regular watch specialist position and includes a 12% pay increase. In order to qualify, the candidate must already be a vessel traffic specialist. Watch supervisor candidates undergo a week-long training course. Candidates are taught management techniques through role-playing and simulation. They are also instructed on disciplinary techniques through a videotape and discussion. At the final stage of qualification, the oral board, candidates must demonstrate the necessary skills in terms of "judgment, management and leadership."

The study guide used by Marine Exchange in training new watch supervisors does not make many references to personnel responsibilities such as hiring,

scheduling, evaluating or disciplining VTS watch specialists or other Marine Exchange employees. It does state generally that the watch supervisors are to spend approximately 25% of their time "supervising" the watch specialists. The description also states watch supervisors are responsible for the proper conduct of the VTS watch and the maintenance of all records, supervising vessel traffic specialists and supervising training of qualified and new personnel and properly completing all administrative functions of the watch.

The position description for the VTS watch specialists themselves does not identify the watch supervisor as the person who will be their supervisor. It states that the "name and title of the person from whom you ordinarily receive instructions and who supervises or reviews your work" is the Operations and Training Manager. The Operations and Training Manager's position description specifies that he is to be responsible for approving and implementing the VTS monthly watch schedule, assigning watch hours, approving overtime, and providing guidance on "personnel issues".

The watch supervisor testified at the hearing that his job duties during the course of a 12-hour watch are essentially the same as those of the VTS watch specialists who are the other members of his regular watch team. Like the other two employees, he rotates between the radar watch, the information desk and the "off" position on a 2-hour basis. When he works on the radar watch or the desk, his duties are substantially the same as theirs. Similarly, when he takes his regular 2-hour break, he normally leaves the watch room and spends his time in the lounge or other non-work areas just as they do. The Operations and Training Manager testified that a watch supervisor, when not involved in training, spends 95% of his time doing the regular duties of a watch specialist.

The watch supervisors are not involved in hiring VTS vessel traffic specialists. Applicants for those positions are interviewed and selected by the Marine Exchange Executive Director, Deputy Executive Director and Operations and Training Manager. The watch supervisors do not assign the specialists to regular

watch teams or make up the monthly watch schedules. Those functions are performed jointly by the Marine Exchange Operations and Training Manager and the Senior Coast Guard Watch Supervisor. The watch supervisors do not prepare the performance evaluations given to the watch specialists on their team. That function is performed by the Marine Exchange Operations and Training Manager.

1. ASSIGNMENT OF WORK

Marine Exchange has no written formal procedures for allocating the radar, information desk and "off" position tasks on the shift. The testimony indicates that, as a rule, the watch team members discuss the positions among the three of them and agree as to who wants to start on the radar, who wants to start on the desk and who wants to start in the "off" position. Some teams have a "normal routine" which has evolved over time and the various teams members go to their preferred positions each day without any discussion.

Other teams discuss the matter each day and agree as to who will be in which position. If, for example, one of the employees has brought food to work, the other team members will offer to let him start in the "off" position. The watch supervisor does have the authority to resolve a disagreement over such matters, but the testimony was that such disagreements virtually never arise.

During the course of the shift, the normal rotation of tasks may be modified as necessary to handle the workload. On occasion, the watch supervisor may request the employee in the "off" position to assist on the radar, if there is, for example, heavy ship traffic or adverse weather conditions, or to help on the information desk, if there are many calls. On occasion, the watch specialist working the radar or information desk may ask the watch supervisor to come off his break and assist. The members of the watch team often ask each other for assistance or technical advice on situations arising during the course of the shift. The testimony indicated that in such situations the three members pull together and try to resolve the problem.

The watch supervisor has the authority to instruct another team member to come off his break and assist as necessary. The watch supervisor who testified stated that he has no authority as a watch supervisor to "order" a specialist back to work if he refuses. Should that happen, the watch supervisor would contact the Operations Manager or someone else in Marine Exchange management to initiate formal disciplinary action. Such a situation has, however, never arisen.

2. ASSIGNING REPLACEMENTS

There are detailed written guidelines and procedures governing the assignment of a replacement specialist in the event a regular team member is unable to work. They are set forth in the Marine Exchange Watch Supervisor Training Study Guide and the VTIS Operations Manual. Thus, the Training Study Guide states that:

In the event a watchstander fails to report on time or upon reporting appears incapacitated for duty, a similarly qualified watchstander must remain on duty until a suitable relief can be arranged. The Watch Supervisor shall notify the Senior Coast Guard Watchstander and Deputy Executive Director of the Marine Exchange.

When a relief watchstander has not arrived by the prescribed relief time the watchstander shall:

- 1) Remain on watch until the assigned relief arrives or some other qualified person assumes the duty.
- 2) Attempt to contact the relief at home. If the member answers and will be in soon (or is en route), leave a note for the Senior Coast Guard Watchstander or Deputy Executive Director of the Marine Exchange, as appropriate, stating WHO the relief is, and WHEN the relief was actually completed.
- 3) If the member (or someone else) answers and declares he/she will not be able to work, ascertain the reason, make a log entry, and contact the Senior Watch Supervisor or Senior Coast Guard Watchstander immediately to discuss arrangements for a relief.
- 4) If unable to reach the member or otherwise determine his/her status you may assume traffic or mechanical difficulty has caused the delay. If the member does not arrive or phone within 30

minutes, notify the Senior Coast Guard Watchstander or Marine Exchange Senior Watch Supervisor as appropriate.

The VTIS Operations Manual provides that "when for any reason the oncoming watchstander does not assume the watch, the Senior Coast Guard watchstander or the Operations Manager of the Marine Exchange, as appropriate, shall be notified". In cases of minor injury or illness which incapacitates an employee for specialist duties, the watch supervisor must "notify the Senior Coast Guard Supervisor or the Operations Manager of the Marine Exchange, as appropriate, to arrange for a relief".

3. GRANTING TIME OFF

The testimony indicates that when a watch supervisor is notified that a (civilian) member of his team is unavailable to work, or is sick and must leave during the middle of a shift, he checks the schedule to ascertain who is available to fill in. He then contacts the Marine Exchange Operations and Training Manager or the Deputy Executive Director, gives him the names of the individuals who are available to work, and asks which of them he should call. The Operations Manager or Deputy Executive Director choose the employee and either instruct the supervisor to make the call or makes the call themselves. In some cases, the Operations Manager or Deputy Executive Director may review the schedule themselves before deciding on a replacement.

Testimony from the watch supervisor indicates that the Operations Manager or Deputy Executive Director "decide who I should call based on who I let them know is available". The watch supervisor may or may not make a recommendation regarding which individual to call. According to the testimony, the skill level of the individuals is not a factor because they are all equally qualified to do the job.

If the watch supervisor is unable to contact either the Operations and Training Manager or the Deputy Executive Director, he would then have the authority to make arrangements for a relief specialist without consulting them. According to

the testimony, however, such a situation has never arisen or may have occurred once . Under Marine Exchange's "Briefings and Notifications" policies and guidelines, either the Deputy Executive Director or the Executive Director must be available on call 24 hours a day, including weekends and holidays.

The Operations and Training Manager testified that the watch supervisors have no authority to grant members of their teams a "whole day off." When a team member becomes ill within the last hour or two of a shift, the watch supervisor may determine that the workload is such that the other team members can complete the watch without calling in a replacement. The watch supervisor can let the sick team member to go home. He then makes a note in the "rough log" and calls the Operations Manager or Deputy Executive Director to advise them of what has happened. The testimony was that this occurs a few times a year. The watch supervisor testified that in such situations he is not really "making a decision" because the employee is too sick to continue to work.

When a team member calls in at the beginning of the shift to indicate that he or she will not make it to work on time, the watch supervisor asks one of the outgoing team members to fill in until the employee arrives and then he notifies the Operations Manager or the Deputy Director.

A Marine Exchange civilian specialist was given special permission to leave early on a regular basis, to attend a night class, subject to a determination by her Coast Guard watch supervisor that the workload did not require her presence. The Operations and Training Manager approved the arrangement in advance.

4. DISCIPLINE AND GRIEVANCES

The testimony indicates that watch supervisors have never been told that they have the authority to terminate, suspend, demote, or give written warnings to other employees.

The Operations and Training Manager testified that the watch supervisors have no authority to issue written warnings to other members of their teams. He

stated watch supervisors can "verbally counsel" an employee to resolve disputes among team members. The verbal counseling is generally not noted in the employees' record. The Operations Manager testified that he does not normally learn that the counseling has taken place unless the watch supervisor advises him of the situation and asks him for advice on how to handle it or requests that he investigate it for possible documentation.

The Operations Manager does not terminate or suspend Marine Exchange employees. That is done by higher Marine Exchange management. Only one termination has occurred since the watch supervisor position was created in 1997. The decision to terminate that individual, for performance-related reasons, was made by Marine Exchange's Deputy Executive Director.

The Operations Manager testified regarding a verbal counseling by a watch supervisor in a situation in which two watch team members were not getting along. The watch supervisor discussed the conflict with the individuals involved and tried to persuade them to work out their problems. That proved ineffective as the employees had a second dispute. At that point the watch supervisor approached the Operations Manager with the problem and asked him for advice. The Operations Manager then counseled the individuals involved. The Operations Manager testified that when a watch supervisor comes to him, it is usually because "the problem is beyond their capability to handle because they are at that point where they want us to do something about it or step in." The Operations Manager said in such circumstances the watch supervisor is coming to him with a "problem" rather than a "recommendation for a particular kind of discipline". More serious problems such as alleged discrimination or harassment, would normally be referred immediately to upper management for further action.

The Operations Manager said his usual practice was to talk to the employees involved as well as the watch supervisor before deciding how to handle the situation. As to whether the Operations Manager conducts an independent investigation, he testified that, "I don't rely solely on what the supervisor brings me" and that "I'll talk to the individuals involved at that point and find out what

the gripe is". He further testified that after talking to the watch supervisor, he would then talk to the employees and make his own independent judgment on the matter. The Operations Manager also testified that he normally talks to the Coast Guard in such situations because "we do things together" and any reassignment of a team member to another team would require a change in the jointly-approved work schedule.

It is Marine Exchange's written policy that:

Whenever an employee believes he/she has a work related problem, he/she should bring the matter to the attention of his/her immediate supervisor. It is the supervisor's responsibility to investigate the complaint, to attempt to resolve the complaint, and to communicate a decision to the employee within a reasonable time.

According to the Operations Manager, the watch supervisor is the "immediate supervisor" for all vessel traffic specialists within the meaning of Marine Exchange's grievance policy. Thus, the watch supervisor is "initially responsible on behalf of Marine Exchange to address a vessel traffic specialist grievance or work related complaint." Ideally, watch supervisors should handle the grievances themselves but if they are unable to diffuse the situation or reach an agreement, they seek higher management.

There was testimony of an incident in which a complaining employee attempted to bypass the watch supervisor and complain directly to the Operations and Training Manager. Before he took action, the Operations Manager stated that he instructed the complaining party to follow the chain of command and bring the issue to the attention of the watch supervisor.

5. EVALUATING EMPLOYEES

As noted, the watch supervisor does not prepare performance evaluations for the specialists on his regular watch team. The watch supervisor does, however, complete an evaluation form for any vessel traffic specialist trainee who may be assigned to his team for a several day training period.

There is no formal structure for how job training is conducted. The decision of how to structure the trainee's experience is left to the watch supervisor. As a rule, a trainee is assigned to each of the regular watch teams at some point during the course of their 4-6 week training process. All four of the regular watch supervisors complete evaluation forms for the trainee. Specialists on the various teams, to whom the trainees are assigned for training, may also complete evaluation forms. The testimony indicated that there may often be seven or more evaluation forms for any one trainee.

The forms are normally completed at the end of the training period. The watch specialists to whom the trainee has been assigned write their comments on the evaluation form. The form is then reviewed by the watch supervisor, who may add additional comments before initialing the form and submitting it to Operations and Training Manager. The forms are then reviewed by the Operations Manager and the Coast Guard Chief Officer, who determine whether the trainee is ready to appear before the joint Marine Exchange-U.S. Coast Guard oral board which will make the ultimate decision regarding his or her qualifications to work as a vessel traffic specialist. Before deciding whether to advance a trainee to the oral board, the Operations Manager and the Coast Guard Chief may also conduct a "pre-board" of their own.

Sometimes, the written evaluations submitted by the watch supervisors and specialists on a particular trainee may be in conflict. The Operations Manager testified that he does not rely solely on the evaluation forms. He goes to each of the watch supervisors and asks them further questions concerning the trainee in question. In some cases, he may also question the specialists about the trainee.

C. ANALYSIS AND CONCLUSION

Section 2(11) of the Act defines a supervisor as:

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend

such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The criteria listed in Section 2(11) are to be read in the disjunctive so that the exercise of any one of the indicia listed in Section 2(11) may warrant a finding of supervisory status. Queen Mary, 317 NLRB 1303 (1995); Northcrest Nursing Home, 313 NLRB 491 (1994); Allen Services Co., 314 NLRB 1060 (1994).

Section 2(11) also contains the "conjunctive requirement that the power be exercised with 'independent judgment,' rather than in a 'routine' or 'clerical' fashion." Chevron U.S.A., 309 NLRB 59 (1992).

Additionally, in finding someone to be a supervisor the Board is denying that person rights under the Act so the Board must be careful to find that "only persons with genuine management prerogatives should be considered supervisors as opposed to straw bosses, leadmen . . . and other minor supervisory employees." Chicago Metallic Corp., 273 NLRB 1677 (1985).

The party attempting to exclude individuals from voting for a collective-bargaining representative, by alleging that they are statutory supervisors, has the burden of establishing that they are supervisors within the meaning of Section 2(11) of the Act. Billows Electric Supply, 311 NLRB 878 (1993); Health Care & Retirement Corp. of America, 306 NLRB 62 (1992); Ohio Masonic Home, 295 NLRB 390 (1989).

The Board has held that in cases where "...the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [it] will find that supervisory status has not been established, at least on the basis of those indicia." International Center for Integrative Studies/The Door, 297 NLRB 601 (1990); Phelps Community Medical Center, 295 NLRB 486 (1989).

Applying these standards, the Board has held consistently that possessing one or more of the supervisory powers enumerated in Section 2(11) makes an individual a statutory supervisor only if in doing so he exercises true independence of judgment on behalf of management. NLRB v. Aquatech, Inc.,

926 F.2d 538 (6th Cir., 1991); International Ladies Garment Workers Union v. NLRB, 339 F.2d 116 (2d Cir., 1964). Thus, an employee is not a supervisor under the Act merely because he performs one of these supervisory tasks in a merely "routine, perfunctory or sporadic" manner. The exercise of supervisory authority on a few occasions is not sufficient to confer supervisory status on an individual where it is not his "regular function" or part of his "primary responsibility." Highland Superstores, Inc. v. NLRB, 927 F.2d 918 (6th Cir., 1991); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679 (7th Cir., 1982).

It is also well settled that the mere assertion by an employer that an individual "supervises" other employees is insufficient to make the individual a supervisor under Section 2(11). The Board traditionally ignores such conclusionary statements concerning supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991); Greenpark Care Center, 231 NLRB 753 (1977); New York University, 221 NLRB 1148 (1975).

Similarly, supervisory status may not be inferred from the fact that an employee's job title or job description designates him as a "supervisor" or "manager." Bowne of Houston, 280 NLRB 1222 (1986); NLRB v. Southern Bleachery & Print Works, 257 F.2d 235 (4th Cir., 1958), cert. denied, 359 U.S. 911 ("the employer cannot make a supervisor out of a rank and file employee simply by giving him the title"). Only where the employee has been made aware of his supervisory authority, and has in fact exercised it on a regular basis, will he or she be excluded from the protections of the Act.

Nor is an experienced and knowledgeable employee a supervisor merely because he or she holds a responsible position which requires the exercise of some degree of discretion in making decisions. King Broadcasting Co., 329 NLRB No. 39 (September 30, 1999) ("...even the exercise of substantial and significant judgment by employees in instructing other employees based on their own training, experience and expertise does not translate into supervisory authority responsibly to direct other employees").

Based on the above, and the following, I conclude that the evidence does not support the Employer's contention that the watch supervisors exercise "independent judgment" sufficient to make them statutory supervisors by assigning work, assigning replacements, granting time off, disciplining, handling grievances for or evaluating employees.

1. ASSIGNMENT OF WORK

In *King Broadcasting Co., supra*, the Board reaffirmed its long-established rule that "...merely having the authority to assign work does not establish statutory supervisory authority. Further, not every act of assignment constitutes statutory supervisory authority." In that case, the Board concluded that producers and assignment editors employed by a local television station, who had authority to organize, coordinate and direct newscasts, select news stories and assign them to reporters and photographers based on their assessment of relative skills, change assignments if necessary, and direct reporters to rewrite stories, were not statutory supervisors.

The Board found in *King Broadcasting* found that while the assignment editors were responsible for "ensuring that all stories are covered...the assignment of story coverage is a collaborative effort on the part of all involved, particularly those assignments made as a result of the daily planning meetings." Similarly, it found that while the producers were responsible for all production activities related to the newscasts, their authority to direct other employees was based on their "experience, skills and training" and was "incidental" to their ability to perform their own work as part of an "integrated production team."

Under *King Broadcasting*, the authority of the watch supervisors in this case to modify the rotation of job tasks among the members of their 3-person watch team clearly does not require the exercise of "independent judgment" within the meaning of Section 2(11). The testimony indicated that most often it is established practice for the team members to allocate the positions among themselves informally by mutual agreement.

Even, assuming arguendo, that the watch supervisors do make a formal assignment of starting tasks each day--such authority would not confer supervisory status. Nor would their authority to change the regular rotation of job tasks, or to request a team member in the "off" position to assist on the radar or information desk during busy periods, amount to anything more than routine direction of the less skilled or experienced workers. North New Jersey Newspaper Company, 322 NLRB 394 (routine rotation of employees); Lakeview Health Center, 308 NLRB 75 (1992); Hydro Conduit Corp., 254 NLRB 433 (1981); Quadrex Environmental Co., 308 NLRB 101 (1992) (assignment of tasks by leadman was based on "nothing more than the knowledge expected of experienced persons regarding which employees can best perform particular tasks").

2. ASSIGNING REPLACEMENTS

Similarly, I conclude that calling in a replacement, when a regular team member is unable to work, is insufficient to confer supervisory status. The watch supervisors usually do not make the decision regarding which individual to call in. The decision is usually made by the Operations and Training Manager or the Deputy Executive Director. Again, even, assuming arguendo, the watch supervisors did call in replacements without consulting management, that still would not make them statutory supervisors. Waverly-Cedar Falls Health Care Center, 297 NLRB 390 (1989) (calling in replacement from established call-in list did not require use of independent judgment); Riverchase Health Care Center, 304 NLRB 861 (1991).

3. GRANTING TIME OFF

The watch supervisors have no authority to grant vacation requests or other requests for "whole days off." Watch supervisors, however, can permit employees to leave work early if they are sick, taking classes or for some other reason. The Board, however, has held that granting such requests does not involve the use of independent judgment within the meaning of Section 2(11) of the Act. North New Jersey Newspaper Company, *supra*; Hydro Conduit Corp., *supra*.

4. DISCIPLINE AND GRIEVANCES

The watch supervisors do not discharge, suspend, demote or issue written warnings. Nor is there any evidence that they have the authority to effectively recommend such action. They can, however, "verbally counsel" team members who are not getting along or having other job related problems. If this counseling, however, proves ineffective, they refer the problem to the Operations and Training Manager for documentation of the problem or other corrective action. The verbal counseling is not recorded in the employee's file.

It is settled, however, that "merely issuing verbal reprimands is too minor a disciplinary function to be statutory authority." *Passavant Health Center*, 284 NLRB 887 (1987). *Hydro Conduit*, *supra*, at 437 ("verbal reprimands do not constitute 'discipline' within the meaning of Section 2(11) of the Act"). In fact, even written reprimands or warnings do not establish supervisory authority unless it is shown that they serve as "a basis of later personnel action without independent investigation or review by the Employer." *Riverchase Health Care Center*, *supra*, at 865; *Waverly-Cedar Falls Health Care Center*, *supra*; *North New Jersey Newspaper Company*, *supra*.

The Operations Manager certified that he usually conducts an independent investigation of any problems referred to him by a watch supervisor before making his own judgment regarding the need for further action. An effective recommendation generally means that the recommended action is taken with no independent investigation by supervisors, not simply that the recommendation is ultimately followed. *ITT Lighting Fixtures*, 265 NLRB 1480 (1982).

Additionally, responsibility to report infractions to higher management is insufficient to confer supervisory status as it does not lead to personnel action without review by others. *Artcraft Displays, Inc.*, 262 NLRB 1233 (1982) (leadmen not supervisors even though they report employee problems to employer); *Knogo Corp.*, 265 NLRB 935 (1984) (leadperson was not agent of employer although

she reported rule infractions or repeated incidents of poor performance by other employees where discipline was preceded by an independent investigation.)

McClatchy Newspapers, 307 NLRB 733 (1993), cited by the Employer, is distinguishable as the alleged supervisor in that case had the power to issue written and oral warnings, as opposed to merely "verbally counseling" the employees, as in the present case.

Based on the above it cannot be concluded that the watch supervisors "effectively recommended" disciplinary action. As noted in Quadrex Environmental Co., *supra*, notifying management of employee performance problems did not constitute effective recommendation of discipline where "management would determine independently, after conducting its own investigation, what, if any, action should be taken."

5. EVALUATING EMPLOYEES

The Employer contends that watch supervisors exercise Section 2(11) supervisory authority in completing written evaluation forms for vessel traffic specialist trainees.

The Board has held that "the ability to evaluate employees...without more, is insufficient to establish statutory supervisory authority." Harbor City Volunteer Ambulance Squad, Inc., 318 NLRB 764 (1995) (citing Passavant Health Center, *supra*). Completing an evaluation form which is "but one aspect of the total information considered" in determining whether to promote an employee does not confer supervisory status. Hydro Conduit Corp., *supra*, at 437; Children's Farm Home, 324 NLRB 61 (1997) (evaluation which is "merely advisory and preliminary" does not constitute effective recommendation of salary increase). To establish supervisory status, it must be shown that the evaluation in question was not only considered by the ultimate decision maker, but that it affected the job status of the involved employee in a "direct or systematic way"; Hausner Hard-Chrome of KY, Inc., 326 NLRB No. 36 (August 27, 1998).

The evaluation form of the trainees submitted by the watch supervisors is only a small part of the information considered by Marine Exchange management in making its ultimate determination regarding the qualifications of a specialist trainee. Similar evaluations are submitted by the VTS vessel traffic specialists who have been assigned to work with the trainee. The Operations and Training Manager stated that he and the Chief Coast Guard Watch Supervisor take all of the evaluations into account in determining whether the trainee is ready to advance to the joint Marine Exchange-U.S. Coast Guard oral board which will ultimately determine his or her qualifications. The fact that management seeks advice as to the potential of prospective employees from current members of its own complement is not itself sufficient to confer supervisory status. Mower Lumber Co., 276 NLRB 766 (1985).

I conclude that completion of these evaluation forms by watch supervisors does not constitute supervisory authority. While such evaluations may be taken into consideration in determining whether to advance a trainee to the next step, they have no real "decisive effect" on the ultimate decision regarding the trainee's qualifications. Arizona Public Service Co., 310 NLRB 477 (1993); Ahrens Aircraft, Inc., 259 NLRB 839 (1981); Ohio River Company, 303 NLRB 696 (1991) (evaluation of probationary deckhands by mates did not constitute effective hiring recommendation). I would also note that in Ohio River Company, the Board held that "the mere training of other employees by a senior and more experienced employee, or that employee's evaluating another employees' skills in an assignment of routine work, doesn't establish supervisory status."

In summary, I conclude that rather than supervisors, the watch supervisors are classic "leadmen" who exercise only minor supervisory authority over less experienced employees and are not supervisors within the meaning of Section 2(11).

According to the testimony, the watch supervisors perform essentially the same job functions as the other members of their teams up to 95 percent of the time. Although they may have limited authority to assign or direct other employees,

and for example, alter the regular rotation of job tasks during the shift or hold an employee over, that is based on their greater experience and technical expertise. See Brown & Root, Inc., 314 NLRB 19 (1994). As noted in Brown & Root, "It is well established that the exercise of authority on the part of more skilled and experienced employees...to assign and direct other employees in order to assure the technical quality of the job does not in itself confer supervisory status".

III. MANAGERIAL STATUS

Although the Act contains no explicit reference to managerial employees, the Supreme Court excluded them from coverage in NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). In that decision, the Court defined managerial employees as those with discretion to "formulate and effectuate employer policies by expressing and making operative the decisions of their employer." The Court noted that such employees are "much higher in the managerial structure" than the supervisors explicitly excluded by Congress, which "regarded [managerial employees] as so clearly outside the Act that no specific exclusionary provision was thought necessary."

Thus, an individual can be excluded from the bargaining unit as a managerial employee only if they "exercise discretion within, or even independently of, established employer policy and are aligned with management." NLRB v. Yeshiva University, 444 U.S. 672 (1980). It must be shown that they "represent management interests by taking or recommending discretionary actions that effectively control or implement employer policy." Managerial status is thus "reserved for those in executive-type positions, those who are closely aligned with management as true representatives of management." General Dynamics Corp., 213 NLRB 851 (1974).

The Bell Aerospace definition of managerial status "has been construed narrowly, as indeed it should be, because those people who fall within it are to be denied substantial statutory rights." Curtis Industries, Division of Curtis Noll Corporation,

218 NLRB 1447 (1975). As the Board noted in Curtis, "many employees whose job titles indicate on the surface managerial status and whose job descriptions call for a high degree of responsibility...have been found to be employees rather than managerial personnel since they do not exercise sufficient independent discretion or otherwise effectuate management policies."

As with supervisors, the party seeking to exclude an individual from participating in a representation election as a manager has the burden of establishing that the individual is ineligible. As with supervisors, where the evidence on the issue of managerial status is in conflict or otherwise inconclusive, the Board will find that the party seeking exclusion has failed to meet its burden. International Center for Integrative Studies, supra.

The Board will find an employee to be non-managerial where it is shown that the employee's decisions are governed by detailed management policies, procedures, guidelines or government rules or regulations. N.L.R.B. v. Louisville Gas & Electric Co., 760 F.2d 99 (6th Cir., 1985); Southwest Airlines Co., 239 NLRB 1253 (1978).

The Board has also held that the exercise of discretion in making decisions requiring considerable technical expertise or experience is not sufficient in itself to confer managerial status. Thus, in General Dynamics Corp., supra, at 858, the Board held that engineers employed as "proposal managers" and "project leaders" were not managerial employees despite the fact that they exercised broad discretion in determining the technical and business feasibility of proposed projects, laying out operational plans, determining budget requirements, selecting and assigning team members to carry out the plans, scheduling work, communicating with customers, and evaluating the performance of team members.

The Board found in General Dynamics that the discretionary decisions made by these employees in the course of their work were "routinely rendered on the basis of...technical expertise and in accordance with the task assigned [by man-

agement]." Rejecting the employer's contention that the exercise of independent judgment in making such decisions constituted the formulation or effectuation of company "policy" within the meaning of Bell Aerospace, the Board held that:

The fact that the employees involved may handle the entire project assigned to them undoubtedly is a tribute to their organizational skills and abilities, but has little, if any, bearing on managerial authority. Their discretions and decisions are predicated solely on a technical base, and culminate in technical reports or recommendations to managerial superiors who, in turn, determine, establish and carry out management direction, i.e., "policy," by approving or disapproving the recommendations presented.

It was concluded that the proposal managers and project leaders were not "true representatives of management in the traditional sense, or that Congress intended that managerial status be conferred upon, or extend to, such employees." The Board observed that conferring such status upon them "would eviscerate the traditional distinction between labor and management."

The Board has come to the same conclusion in numerous other cases involving employees who were authorized to exercise far more discretion in making operational decisions than is claimed for the watch supervisors at issue in this case. In each such case, the Board found that the decisions made by the individuals in question did not constitute the formulation or effectuation of company "policy" within the meaning of Bell Aerospace and the other decisions cited above. American Standard, Inc., 237 NLRB 45 (1978) (production planners not managerial employees where their operational decisions were "... based essentially on their technical knowledge of the Employer's production capabilities"); Southwest Airlines Co., *supra* (airline flight dispatchers authorized to delay, cancel, reroute or add scheduled flights were not managerial employees where their decision-making authority was narrowly circumscribed by federal regulations and employer policies); Twin Coast Newspapers, Inc., 305 NLRB 412 (1991) (district managers with discretion to select and sign contracts with carriers, implement steps to improve delivery and increase circulation, and award bonuses and other incentive payments were not managerial employees

where their decisions were "either subjected to independent investigation by their superiors, or made within a narrow framework of allowable company policy"); Northeast Utilities Service Corp., 35 F.3d 621 (1st Cir. 1994) (pool coordinators with substantial discretion to determine operating times and power levels, set and implement maintenance schedules, approve or disapprove transmission outage applications and dispatch power uneconomically to improve overall system reliability were not managerial employees).

Based on the above, I conclude that there is little to support for the Employer's contention that the watch supervisors have significant discretion in formulating or effectuating the policies of Marine Exchange. The Employer's argument is that by virtue of their function as the primary representative of Marine Exchange management during the VTIS watches, that the watch supervisors are asked to "essentially dictate company policy" with respect to the operation of the VTIS and Marine Exchange and Coast Guard personnel working the VTIS every day.

The Employer contends that a good example of how watch supervisors exercise managerial authority on behalf of Marine Exchange is the watch supervisor's ability to grant "deviations" to vessels. Despite the Employer's contentions, I conclude that there is insufficient evidence to find that the watch supervisors exercise the kind of "executive-type", "policy making" discretionary decision-making authority necessary to exclude them from the bargaining unit as managerial employees.

With reference to the watch supervisors managerial authority in granting "deviations", the record does not bear out the Employer's assertions. The VTIS system involves extensive written policies, procedures, rules and guidelines. It is governed by extensive state and federal laws and regulations. The restrictions are set forth in various manuals including the VTIS Operations Manual, the Watch Supervisor Training Study Guide, the "short fuse" vessel deviation procedures, and various other documents. These documents contain detailed step-by-step instructions for handling virtually any situation which might arise in the course of the VTIS operation. The "short fuse" rules for example, contain extensive de-

tailed guidelines and procedures for granting temporary short-term emergency “deviations” from normally applicable Coast Guard vessel requirements. These guidelines and procedures leave little in the way of discretion to the VTIS.

The watch specialists and watch supervisors are bound by the written policies, procedures, guidelines, rules and regulations. The documents are kept in the VTIS watch room so that they will be readily available in case the watch team members need to consult them. The evidence establishes that the Employer’s watch supervisors have considerably less discretionary decision-making authority than the employees who were found not fall within the managerial exclusion in General Dynamics, American Standard, Southwest Airline, Northeast Utilities, and other cases cited, supra.

Thus, I conclude that the watch supervisors have no significant authority in personnel matters, perform essentially the same job functions as the VTS vessel traffic specialists, and have no authority to make anything other than routine operational decisions, based on greater experience and technical expertise rather than true supervisory or managerial status. Additionally, they work within tight limitations imposed by detailed written rules, guidelines, policies, procedures and regulations. Thus, I conclude they are not managers (or supervisors) and shall be included in the unit.

There are approximately 12 employees in the unit found appropriate.

- 3/ In accordance with Section 102.67 of the Board's Rules and Regulations, as amended, all parties are specifically advised that the Regional Director will conduct the election when scheduled, even if a request for review is filed, unless the Board expressly directs otherwise.

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